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WORK RELATED TO THE CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS AND OTHER INTERNATIONAL ARRANGEMENTS AND AGREEMENTS: OTHER INTERNATIONAL, REGIONAL AND BILATERAL ARRANGEMENTS AND AGREEMENTS RELATED TO TRANSNATIONAL CORPORATIONS

Other international, regional and bilateral arrangements and agreements related to transnational corporations

Report of the Secretary-General

SUMMARY

The present report concentrates on bilateral investment treaties and covers a number of significant developments in this area since the Centre last reported to the Commission on these treaties. The number of bilateral investment treaties has continued to grow at a steady rate and, quite significantly, several Central and Eastern European countries, together with certain Latin American States, have become signatories to such treaties within the past few years. Generally speaking, bilateral investment treaties concluded in recent years show a marked similarity with other bilateral treaties in this area, and, in the main, they continue to address issues such as the conditions of entry for foreign investment, general standards of treatment for foreign investors, the right to transfer payments, the question of compensation in the event of an expropriation and the settlement of disputes. While most bilateral investment treaties emphasize the protection of investments, additional attention could be paid to the promotion of investments on the part of capital-exporting countries, and it is this area that could perhaps lead to the most significant developments in the near future.

* E/C.10/1991/1.

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INTRODUCTION

1. At its sixteenth session, the Commission on Transnational Corporations decided to include in its provisional agenda for its seventeenth session a sub-item entitled "Other international, regional and bilateral arrangements and agreements related to transnational corporations". The Commission requested the Secretary-General to undertake further work on international arrangements and agreements related to transnational corporations. The present report, which focuses on bilateral treaties for the protection and promotion of foreign direct investments, is in response to that request.

2. In 1988, the United Nations Centre on Transnational Corporations published a general survey of state practice in the area of bilateral investment treaties that sought, inter alia, to analyse the main provisions in those treaties and to assess their overall significance in international relations. 1/ Against the background of that publication, chapter I of the present report reviews recent developments and trends pertaining to bilateral investment treaties and, in particular, identifies developments in state practice that have occurred within the past three years. Chapter II undertakes a detailed analysis of the legal and political issues that have assumed particular significance in the negotiation of recent bilateral investment treaties, and relates those issues to the general international context in which they have occurred. Chapter II draws heavily from a forthcoming study by the Centre on practical and other problems that arise in the actual negotiation of bilateral investment treaties.

I. RECENT DEVELOPMENTS AND TRENDS

3. Since the publication of the survey on bilateral investment treaties, in 1988, over 70 additional treaties have been concluded. The total number of such treaties signed by mid-1990 exceeds 370. This rapid increase in the number of bilateral investment treaties may be explained primarily by the actions of Central and Eastern European States in this respect, and most notably by the practice of Poland and the Soviet Union, which, during the past two years, have signed 17 and 12 treaties respectively. Other Central and Eastern European countries that had already become signatories to bilateral investment treaties during the 1970s and 1980s (e.g., Bulgaria, Hungary, Romania and Yugoslavia) have also concluded new treaties, so that, altogether, States from this region have been signatories to nearly two thirds of all such treaties concluded since 1987. The reason for this pattern may be briefly stated. Central and Eastern European countries are currently undergoing fundamental changes in their economic, political and legal systems as part of an overall effort to become more integrated in the world economy. An important element in the economic strategy of these countries is the encouragement of foreign investment, mainly from transnational corporations based in developed market economies, and the perception is that bilateral investment treaties will engender confidence among such investors. In other words, the hope is that, by creating a climate of certainty and stability, these treaties will help to stimulate and increase investment flows.

4. In the period under review, certain Latin American countries - Argentina, Bolivia, Uruguay and Venezuela - have, for the first time, concluded bilateral investment treaties with Western, capital-exporting countries. It is too early to reach any clear conclusions on the implications of this development, but, as in the case of their Central and Eastern European counterparts, the Latin American States concerned seem to be prompted at least in part by the view that bilateral investment treaties may create the climate for increased foreign investment in their respective economies. In other regions of the developing world, however, the rate at which countries have concluded new agreements has been considerably slower. In Africa, Ghana and Morocco have each signed four new treaties, but in Asia, with the exception of China, only a small number of new treaties have been concluded.

5. For the most part, bilateral investment treaties continue to be agreements between Western capital-exporting countries, on the one hand, and developing, or Central or Eastern European States on the other. In addition, certain countries members of the Organisation for Economic Cooperation and Development (OECD) (i.e., Portugal and Spain) have concluded bilateral investment treaties for the first time, as part of their efforts to expand their foreign direct investment. At the same time, however, only a small number of new treaties have been concluded between developing countries (e.g., Gabon with Morocco and China with Ghana), despite earlier predictions that this could become the main area for the growth of bilateral investment treaties. In recent years, a few treaties have also been signed between Central European and developing countries (e.g., Poland with the Republic of Korea and Romania with Ghana).

6. Still, on the general level, there appears to be few differences between the latest bilateral investment treaties and those concluded in the past. Given the sharp variations in economic and social systems, as well as levels of development, among the signatories of these treaties, this point should not go unnoticed. It may be explained, in part, by the way bilateral treaties continue to be negotiated, namely, through model treaties developed by capital-exporting countries, and also by the fact that in bilateral negotiations the bargaining strength of the capital-exporting State is such that, in most instances, it can insist upon the inclusion of particular provisions. The relative uniformity that prevails in this area, however, does not necessarily imply that bilateral investment treaties reflect a body of internationally accepted principles that now have customary law status. It rather suggests that capital-importing countries find it easier to accept certain conditions from their capital-exporting counterparts in the narrow context of a bilateral relationship (often bundled up in a number of other mutual concessions) than in a broader multilateral ambit.

II. UPDATING ISSUES IN BILATERAL INVESTMENT TREATIES

7. The basic issues covered by bilateral investment treaties have not changed in recent years. They include the definition of investments and investors (which determines the scope of the treaty); several general standards of treatment (fair and equitable, national and most-favoured-nation standards); and a number of more specific standards on several key issues, such as expropriation and compensation,

compensation for losses owing to war and other armed conflicts, transfer of payments and the repatriation of funds, subrogation of the State of the rights of the investor and settlement of disputes. As has already been emphasized, the treatment of these issues in bilateral investment treaties has been characterized by a marked degree of uniformity; nevertheless, on some questions, certain divergent approaches are discernible. It may, therefore, be useful to review some of the main issues covered in recent bilateral investment treaties and to review how such issues may be resolved in the future by drawing on existing multilateral, regional and bilateral arrangements. 2/

A. Definition of investments and investors

8. As a rule, bilateral investment treaties cover foreign direct investment of all types by specifying an open-ended definition of "investments" that embraces not only existing forms of investment but also forms of investment that may be developed after the adoption of the treaty. This approach has proved to be particularly effective to accommodate the increasingly differentiated forms foreign direct investment has taken over the years.

9. With respect to the definition of investors, questions have arisen concerning the determination of what juridical persons are covered as "nationals" of each country party to the treaty. More specifically, it is not always easy to identify which companies have a sufficient link to a particular country to receive protection under a bilateral investment treaty signed by that country. This aspect has become increasingly discernible in recent times with the emergence of complex intercorporate alliances across national borders, which tends to disperse power and control among entities of different nationalities. In this regard, the following situations pose particular problems: (a) investments made by a corporation located in a treaty country but owned by nationals of a third country; (b) investments made by a corporation located in a third country but owned by nationals of a treaty country; and (c) investments made by a corporation in which nationals of a third country have control or a substantial interest.

10. In general, negotiators from capital-importing countries will wish to ensure that nationals from the capital-exporting treaty partner have a substantial interest in, or control over, the investment to be protected. This is so because, if the basis for protection is only the place of incorporation of the company in question, investors from third countries may derive treaty benefits simply by incorporating their venture in the treaty country, a process which is relatively easy under most modern corporate laws. To reduce the possibility of abuse, therefore, many treaties now require that, for a corporation to derive treaty protection, it must be incorporated in a treaty country and have either its seat or the locus of control within that country. Thus, for example, the 1988 treaty between Japan and China states:

> "Companies constituted under the applicable laws and regulations of one Contracting Party and having their seat within its territory shall be deemed companies of that country." 3/

11. Where a country unilaterally denies the benefits of a bilateral investment treaty to a company that purports to have the nationality of a treaty partner, the potential for conflict is evident. To avoid this problem, mechanisms such as consultations on specific cases where the existence of a sufficient linkage between a company and a treaty partner is in doubt can be built into the treaty. An example of such a mechanism can be found in the 1984 treaty between Zaire and the United States. 4/

B. Conditions for the entry of foreign direct investment

12. Many developing countries have adopted laws and policies to regulate the entry of foreign direct investment to their territories and most Central and Eastern European countries are in the process of doing the same. It is therefore important that the provisions of bilateral investment treaties are clear about whether investments under the treaty are governed by the general provisions of the national law or by a special regime. As in the past, most recent treaties leave the matter of admission of investment from the other country to be regulated by the host country, but also emphasize that admission should be facilitated. The standard provision found in most treaties, however, does not normally specify any concrete measures or steps that could be taken to that effect.

13. The bilateral investment treaty recently signed by Poland and the United States, however, has moved beyond the standard bilateral treaty practice. According to a commentary on that treaty, 5/ the Government of Poland attached a side letter to the treaty committing itself to review the requirements on entry of investments in the current Polish law with the United States within two years, with a view to narrowing and subsequently phasing out existing conditions on entry. Moreover, the Government of Poland undertook to adopt a number of concrete steps aimed at streamlining the existing screening process for prospective United States investors, namely:

(a) To issue permits automatically within 60 days, unless the denial is notified and explained;

(b) To use the "state economic interests" criterion only exceptionally and not for the purpose of protecting domestic enterprises from competition;

(c) To apply the same environmental standards to national and United States investors;

(d) To accord United States investors treatment at least as favourable as that accorded to perspective investors from other States.

14. So far, no bilateral investment treaty has achieved an "open door policy" with respect to investments from its treaty partner. The most significant development in that direction is to be found in the recent bilateral treaties signed by the United States that oblige the host country to grant admission to investments from the other country on the basis of national treatment and most-favoured-nation treatment. Thus, article II of the treaty between the United States and Panama (which has not yet been ratified) provides as follows:

"Each Party shall permit and treat such investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable."

The implication of this provision is clear: in deciding on the admission of a foreign investment project, the host country must treat applications by investors of its treaty partner in the same manner as it treats applications by its own national investors or those from other countries.

15. This provision raises a number of questions. For one thing, in most countries certain industries are closed to foreign investors. For another, the application of the concept of national treatment to the entry of foreign investments, no two of which are exactly alike, is far more difficult than is its application to international trade in goods, where this concept first developed. For these reasons, most treaty partners find it easier to grant most-favoured-nation treatment upon entry rather than national treatment, the applicability of which would be subject to severe limitations by qualifying words such as "in like situations". Already, those treaties that have included a provision granting national treatment on entry also include a specific list of areas and industries in which foreign investment may be prohibited, conditioned or limited.

C. Promotion of investment

16. Most bilateral investment treaties purport to deal not only with the protection but also with the promotion of foreign investment. An initial question in this regard is whether it is the host country, the home country or both that has an obligation to encourage investment. In current practice, the answer may vary. Most treaties place a general obligation on the host country to promote investment from the other country. However, expressions such as "favourable conditions for investment", which are commonly used, are highly flexible and subject to numerous interpretations. They may refer only to Government laws and policies and, if so, to which laws and policies? They may refer also to physical conditions necessary for investment such as adequate roads, communications, power supplies and infrastructure.

17. One might also ask whether bilateral investment treaties impose an obligation on the home country to encourage its nationals and companies to invest in the territory of the treaty partner. It would appear that most current treaties do not. Generally, the capital-exporting countries have taken the position that encouraging their nationals and companies to invest in the other country is not their responsibility. Nevertheless, in the spirit of reciprocity, which forms the basis of most bilateral relationships, capital-importing countries could seek to obtain some commitment that the capital-exporting country will take positive steps to encourage investment in the other country. One example of such a general commitment is to be found in article 2, paragraph 3, of the treaty between Cameroon and the Belgium-Luxembourg Economic Union:

"Aware of the importance of investments in the promotion of its policy of co-operation for development, the Belgium-Luxembourg Economic Union shall strive to adopt measures capable of spurring its commercial operations to join in the development effort of the United Republic of Cameroon in accordance with its priorities."

This provision also acknowledges the asymmetrical nature of the relationship between a capital-exporting State and its developing country counterpart, for it does not impose a similar obligation on Cameroon to promote investment in Belgium-Luxembourg.

18. In this respect, the Fourth Lomé Convention between 69 African, Caribbean and Pacific (ACP) countries, on the one hand, and the members of the European Community, on the other, concluded in 1989, provides a useful example of the type of promotional efforts that may be incorporated in bilateral investment treaties. More particularly, article 259 of that Convention specifies that:

"In order to encourage private investment flows and the development of enterprises, the ACP States and the [European] Community, in cooperation with other interested bodies, shall within the framework of [this] Convention:

"(a) support efforts aimed at promoting European private investment in the ACP States by organizing discussions between any interested ACP State and potential investors on the legal and financial framework that ACP States might offer to investors;

"(b) encourage the flow of information on investment opportunities by organizing investment promotion meetings, providing periodic information on existing financial or other specialized institutions, their facilities and conditions and encouraging the establishment of focal points for such meetings;

"(c) encourage the dissemination of information on the nature and availability of investment guarantees and insurance mechanisms to facilitate investment in ACP States;

"(d) provide assistance to small and medium-sized enterprises in ACP States in designing and obtaining equity and loan financing on optimal terms and conditions;

"(e) explore ways and means of overcoming or reducing the host-country risk for individual investment projects which could contribute to economic progress;

"(f) provide assistance to ACP States in:

(i) creating or strengthening the ACP States' capacity to improve the quality of feasibility studies and the preparation of projects in order that appropriate economic and financial conclusions might be drawn;

(ii) producing integrated project management mechanisms covering the entire project development cycle within the framework of the development programme of the State." 6/

19. Some of these or similar measures could be introduced, mutatis mutandis, in bilateral investment treaties. Alternatively, a cross-reference in particular bilateral treaties to the relevant provisions of the Fourth Lomé Convention might be a helpful reminder to the States that became party to that Convention of the type of commitments that already exist among them which could facilitate the promotion of investments on a bilateral basis.

D. General standards of treatment

20. Bilateral investment treaties invariably stipulate some or all of the following general standards: "fair and equitable treatment", "most-favoured-nation treatment" and "national treatment".

1. Fair and equitable treatment

21. The principle of "fair and equitable treatment" was originally used in the draft Havana Charter (1948) and in the OECD draft convention on the protection of foreign property (1967). It is also referred to in the Fourth Lomé Convention signed in 1989, in the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), signed in 1985, and in the draft United Nations code of conduct on transnational corporations. A recent study on key concepts in international investment arrangements 7/ notes that there is still limited practice and arbitral jurisprudence to assist in any attempt to determine the contents of this standard. One possible approach, originally suggested by the commentary to the 1967 OECD draft convention and supported by some commentators of bilateral investment treaties, 8/ is to view this standard as covering an array of international legal principles, among them, non-discrimination, the duty of protection of foreign property by the host country and the international minimum standard. This approach, the study suggests, "might be going too far in its search for specificity". Furthermore, as the precise content of some of these principles has long been the source of much debate, it may not be very helpful to try to define "fair and equitable" treatment in terms of the "international minimum standard" and related concepts.

2. Most-favoured-nation treatment

22. Provisions prohibiting discrimination, as between States, among members of an international organization, or signatories of the same Convention, are found in several international instruments. Although the definitions of this standard in different bilateral investment treaties and other international instruments closely resemble one another, the approaches suggested in article I of the General Agreement on Tariffs and Trade (GATT), and in treaties of friendship commerce and navigation, offer examples of some interesting variations. 9/

23. One important question arising in the present context is whether the most-favoured-nation standard in a bilateral investment treaty may be applied conditionally (i.e., the treaty party becomes entitled to the treatment granted to

a third State only if it is prepared to offer to the granting State the same concessions as the third State has given) or whether it has to be extended automatically to the bilateral treaty partner, regardless of whether or not the latter has offered the same concessions as the third State has. In the first case, the most-favoured-nation clause would apply only on the basis of strict and specific reciprocity. In contrast, under the alternative approach, most-favoured-nation treatment is granted unconditionally and as such, it serves as a way of extending non-discriminatory treatment to all foreign investment. The latter approach has been applied in multilateral and regional arrangements, 10/ but this, in itself, does not necessarily mean that it will be applied in bilateral investment treaties.

24. Another important issue is whether most-favoured-nation treatment should cover all aspects of investment relations, including the grant of special concessions to individual investment projects. Clauses found in some earlier bilateral investment treaties adopt a somewhat restrictive approach to the question. So, for example, the treaty between Indonesia and Denmark provides:

> "Neither Contracting Party shall in its territory impose on the activities of enterprises in which such approved investments are made by nationals or corporations of the other Contracting Party conditions which are less favourable than those imposed in its territory on activities in connection with any similar enterprise ... owned by ... nationals or corporations of third countries." 11/

This provision differs from the usual most-favoured-nation clause in two respects. First, the provision does not refer to "treatment", but rather to the "imposition of conditions". This difference in language could be interpreted to mean that a host country is not obliged to give most-favoured-nation treatment with respect to benefits and advantages granted to investments from third countries. Secondly, the inclusion of the words "similar enterprises" could mean that investments that are different need not be subject to the imposition of similar conditions.

25. A further question arises as to whether it is the investment, the investor or both that is to receive most-favoured-nation treatment. The quoted provision, which refers to "enterprises" and the "activities of enterprises", would appear to exclude other types of investors from most-favoured-nation treatment in such matters as, for example, taxes. To guard against this result specifically, some treaties such as the treaty between the United Kingdom and Jamaica include separate provisions granting the investor and the investment most-favoured-nation status.

26. The granting of most-favoured-nation treatment in a bilateral investment treaty is of special concern to a host country if it plans or has entered into special arrangements - such as a regional grouping, common market or free trade area - that entails special privileges or commitments for investment from member countries. Unless specific exceptions are made, the effect of a most-favoured-nation clause in a bilateral investment treaty will be to extend those privileges to other bilateral treaty contracting parties even if they are not members of such special arrangements.

3. National treatment

27. As it applies in current treaty practice, the precise content of the "national treatment" standard may be established through a review of definitions commonly in use. In fact, the definitions found in international instruments and other authoritative texts are quite similar and, taken together, they furnish a clear picture of the limitations of the standard. 12/ A typical definition is found in the treaties of friendship, commerce and navigation, 13/ while similar but broader formulations are to be found in the definitions in the OECD Declaration on International Investment and Multinational Enterprises, 14/ in the Treaty of Rome (in the special context of a regional integration scheme) 15/ and the various versions of the standard proposed in several drafts of the United Nations code of conduct on transnational corporations. 16/

28. In the context of bilateral investment treaties, this is a standard to which most capital-exporting countries attach a high priority. But the grant of national treatment to foreign investors (as opposed, for example, to goods and products) raises special policy concerns in most host countries. These concerns are particularly acute in developing countries, as such treatment may enable foreign enterprises to compete in the local economy to the detriment of national enterprises. To avoid detrimental results for national investors, therefore, bilateral investment treaties have always sought to qualify, in one way or another, the application of the national treatment standard. There have been recent efforts by some States to expand the application of the national treatment standard to foreign investors by minimizing the exceptions to that standard; however, in view of the sharp differences in development levels prevailing among bilateral treaty partners, it may be necessary for most developing countries to resist those efforts.

29. In practice, national treatment clauses generally take one of two main forms. In the first, the provision mandating national treatment is specifically made subject to a number of exceptions and qualifications either within the provision itself or in separate protocols. The exceptions may be generally worded (for example, they may refer to the need to maintain public order or to measures specified in legislation relating to declared investment objectives), or they may exempt specific sectors or activities from the application of the national treatment standard. The second approach is to limit the application of the national treatment standard to a number of precise foreign investment activities. The unstated implication of this approach is that activities not so mentioned are not entitled to receive national treatment. For example, article 3 of the treaty between Japan and China provides that "the treatment accorded by either Contracting Party within its territory to nationals and companies of the other Contracting Party with respect to investments, returns, and business activities in connection with the investment shall not be less favourable than that accorded to nationals and companies of the [other] Contracting Party". The treaty then proceeds to define "business activities" as including the maintenance of branches, the control and management of companies, the employment and discharge of specialists and experts, and the making and performance of contracts. As is evident, this provision enables host countries to exclude foreign investments from subsidies and incentives granted to encourage national enterprises. Barring the formulation of exceptions, one of the most difficult issues arising in this connection with the

practical application of the national treatment standard is the determination of what amounts to a "like situation" in the specific circumstances of each investment project.

E. Transfer of payments

30. For both the investor and the host country, the provisions on currency transfers are among the most important in bilateral investment treaties. In this area, too, the approach adopted in multilateral agreements can be useful to negotiators. In instruments such as the OECD Codes of Liberalisation, the free repatriation of funds for the purpose of current payments is established as the basic rule, from which, however, various kinds of exceptions are possible. The draft United Nations code of conduct on transnational corporations also takes into account the divergent interests of both developed and developing countries on this issue. On the one hand, it calls upon corporations to obey the host country laws and regulations on payment transfers and to cooperate with government authorities in dealing with balance-of-payment crises. On the other hand, the draft code further specifies that transnational corporations have the right to transfer "all payments legally due", and provides that limitations to transfers should be restrained in content, purpose and time.

31. Capital-exporting countries usually seek specific and broad guarantees with regard not only to the general nature of the investor's rights to make monetary transfers, but also with respect to the nature of the currency with which the payment may be made, the applicable exchange rate and the time within which the host country must allow an investor to make transfers. The United States prototype treaty (art. IV) is an example of this approach. Moreover, the concept of "returns", which is often included in the definition clause, is also key to determining the breadth of the monetary transfer rights. A rather broad definition is found in the recently concluded treaty between Japan and China, as follows: "... the term 'returns' means the amounts yielded by an investment, in particular, profit, interest, capital gains, dividends, royalties and fees". 17/

32. The United States prototype provision contains a categorical obligation of transfer that does not allow a host country any flexibility in the event that its balance-of-payments situation makes it difficult, or indeed practically impossible, to permit an investor to make monetary transfers. Many bilateral investment treaties, however, take this contingency into account and allow the host country certain relief in this situation. An intermediate approach, followed in most bilateral investment treaties signed by the United Kingdom, is to grant exceptional measures in cases of balance-of-payments difficulties, but limited to a certain percentage of the transfer and for a certain period of time only. Yet another approach confers the right to make monetary transfers, but within the terms of the exchange control law of the host country (see, e.g., the treaty between Japan and China, art. 8, para. 2).

F. Performance requirements

33. Except for the specific standards stated in the treaty, most operational aspects of the investment are left to be determined by the laws of the host country. Thus, bilateral investment treaties are usually silent about such matters as performance requirements, employment of local personnel, use of credit facilities and disclosure of information. Sometimes, however, treaties may provide for "sympathetic consideration" for entry, sojourn and employment of foreign nationals in connection with the investment (Federal Republic of Germany-Dominica treaty). However, the United States approach, as reflected in its prototype treaty, 18/ is to seek to obtain treaty rights with respect to a number of operational matters, such as, for example, right of entry and sojourn of aliens for the purpose of operating the investment and employment. In contrast, the policy of many countries, including the United States, is to encourage or give priority to the employment of their own nationals.

34. Where the State gives priority to the employment of its nationals, the grant of an unlimited right to foreign investors to employ any person regardless of nationality may conflict with national policy. Not surprisingly, therefore, some countries have, in practice, succeeded in limiting or qualifying this right through the negotiation process. For example, the United States treaty with Zaire adds the following language immediately after the "prototype" provision on entry and sojourn of aliens: "This provision shall not be construed to confer rights with respect to the entry and sojourn of persons in the territory of either Party, except as provided by national law". 19/ This type of limitation could be further extended to cases where adequately trained nationals of the host country are available to be hired by the foreign enterprise.

35. Another significant new approach found in the United States prototype treaty is its attempt to eliminate performance requirements through bilateral investment treaties. Thus, article II, paragraph 5, of the prototype treaty states:

> "Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements".

Such a categoric commitment often conflicts with established national economic policies and objectives. Here, too, countries have succeeded through the negotiation process in changing the thrust of this provision from an obligation on the host country to a "best-endeavour" standard. The above-mentioned treaty between the United States and Zaire is an example:

> "Within the context of its national economic policies and goals, each Party shall endeavor to avoid imposing on the investments of nationals or companies of the other Party conditions which require the export of goods produced or the purchase of goods and services locally. This provision shall not preclude the right of either Party to impose restrictions on the importation of goods and services into their respective territories." 20/

36. It may be noted that, if the Uruguay Round of multilateral trade negotiations succeeds in concluding an agreement on trade-related investment measures, it could impose a number of obligations on GATT member States in this area. However, it is unlikely that these obligations, at least in an initial phase, will involve an across-the-board lifting of performance requirements in developing countries.

G. Dispossession of the investor

37. One of the original objectives of bilateral investment treaties was to protect investors against nationalization. The taking of property of foreign investors by Governments of host countries has been one of the major concerns in investment relations, particularly in those with developing countries. World economic and political conditions have evolved considerably over the years and, although some debate persists, particularly with respect to the standard of compensation to be paid to the dispossessed investor, much of the discussion may be primarily of symbolic importance at the present time. At the multilateral level, one approach to the issue of compensation upon expropriation is the formulation contained in the latest text of the draft United Nations code of conduct on transnational corporations (E/1990/94, annex, para. 55), which represents a compromise among the different views held by Governments on this matter:

> "It is acknowledged that States have the right to nationalize or expropriate the assets of a transnational corporation operating in their territories, and that adequate compensation is to be paid by the State concerned, in accordance with the applicable legal rules and principles."

38. The formulations used in two recent treaties may be illustrative with respect to other approaches to this issue. Article 5 of the treaty between Japan and China provides:

> "2. Investments and returns of nationals and companies of either Contracting Party shall not be subjected to expropriation, nationalization or any other measure the effects of which would be similar to expropriation or nationalization, within the territory of the other Contracting Party unless such measures are taken for a public purpose and in accordance with laws and regulations, are not discriminatory, and are taken against compensation.
>
> "...
>
> "4. Nationals and companies of either Contracting Party whose investments and returns are subjected to expropriation, nationalization or any other measures the effect of which would be similar to expropriation or nationalization shall have the right of access to the competent courts of justice and administrative tribunals and agencies of the other Contracting Party taking the measures concerning such measures and the amount of compensation in accordance with the applicable laws and regulations of such other Contracting Party."

39. On the other hand, article V of the treaty between the United Kingdom and Costa Rica states:

> "Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated, or subjected to measures having effect equivalent to nationalization or expropriation ... in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party and against prompt, adequate, and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation became public knowledge, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have the right, under the law of the Contracting Party making the expropriation, to prompt review by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph." 21/

Although this provision of the treaty between the United Kingdom and Costa Rica uses the same elements as the above-quoted article from the treaty between Japan and China, there are important differences. First, the latter treaty requires that the expropriation be for a public purpose "related to the internal needs" of the host country, a provision that would arguably prevent it from taking property for foreign policy reasons, such as retaliation for international conflict with another country. Secondly, the standard of review under the latter treaty is more strict in that such review must be prompt, independent and apply the principles of the treaty. Indeed, the treaty between Japan and China does not specifically require a review of the expropriation, but it gives the injured investor access to local courts or agencies. The meaning of "access" is not clear, but one might easily argue that it does imply that a court or tribunal is obliged to review the case.

40. Another major question relates to the standard of compensation. The treaty between the United Kingdom and Costa Rica adopts the Hull formula of "prompt, adequate and effective" compensation. On the other hand, the Japan-China formula states:

> "3. ... compensation ... shall be such as to place the nationals and companies in the same financial position as that in which [they] would have been if expropriation ... had not taken place. Such compensation shall be paid without delay. It shall be effective, realizable and freely transferable at the exchange rate in effect on the date used for the determination of amount of compensation."

Neither of these provisions prescribes the payment of interest and might allow less than fair market value.

H. Settlement of disputes

41. The current trend in bilateral investment treaties is to provide for mechanisms to resolve disputes between individual foreign investors and the host country Government. In many cases, that mechanism is the dispute settlement facilities of the International Centre for the Settlement of Investment Disputes (ICSID) created by the Washington Convention of 1965. Among the new treaties, the relevant clause of the treaty between Venezuela and Italy, signed in 1990, deserves special attention. 22/ It provides that, in the first instance, disputes between investors and the host Government should, as far as possible, be resolved by friendly consultations. If these consultations are not successful, the dispute shall be submitted to the competent judicial or administrative authority of the host country. Should the dispute remain unsettled after 18 months from the date of the notification of proceedings in the host country, it may then be submitted to international arbitration. To that end, the contracting parties grant irrevocable authorization for all disputes to be submitted to international arbitration in the foregoing terms. The treaty mentions two possible arbitration tribunals: ICSID and "ad hoc" arbitration to be set up in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). The treaty provides further that the parties to the dispute shall abstain from recourse to diplomatic protection while any such dispute is sub judice. This clause represents a historic compromise between the main tenets of the Calvo Doctrine, which insists on the settlement of disputes by national courts, and recourse to international arbitration, which is indispensable to most private investors in industrialized countries.

42. The bilateral investment treaty between the USSR and France, signed in 1989, provides also for disputes between investors and the host Government to be settled by an international arbitration tribunal to be established under the rules of UNCITRAL. 23/ The treaty between Poland and the Federal Republic of Germany, signed in 1989, sets up its own procedural rules on the conduct in arbitration for disputes between investors and the host State. 24/

I. Standards of corporate behaviour

43. Existing bilateral investment treaties focus on the rights and privileges of foreign investors but say nothing about their obligations to the host country. None the less, inappropriate behaviour by foreign investors is a matter of concern for host countries, and domestic law alone may not be adequate to deal with the behaviour of a transnational enterprise. Among the areas of concern to host countries are corrupt acts, unwarranted interference in the domestic political process, environmental damage, tax evasion, and restrictive business practices, to name a few. In approaching this problem, it might be useful to keep in mind that a number of multilateral and regional instruments have succeeded in elaborating important standards that reflect the reasonable expectations of the international community concerning ways in which foreign investors should conduct their operations in host countries. The OECD Guidelines on Multinational Enterprises have stated a number of general concepts, principles and standards in this regard. At the present time, they form an integral part of the international framework on

foreign direct investment. On a broader base, the draft United Nations code of conduct on transnational corporations, still under negotiation, contains similar standards. In addition, a number of issue-specific instruments prescribe concrete standards on matters that are essential for the effective and harmonious operation of these corporations across borders; these include standards on accounting and reporting, environment and consumer protection, restrictive business practices, labour relations and illicit payments. Most signatories of bilateral investment treaties are also party to some, if not most, of these instruments. It might be considered whether the effectiveness and balance of these treaties could be enhanced by introducing some of these standards as part of the provisions of bilateral investment treaties, or by acknowledging these standards by way of cross-references, as appropriate.

III. CONCLUSIONS

44. The proliferation of bilateral investment treaties in recent years reflects the general recognition of the importance of foreign investment flows in the economic strategies of capital-importing countries in all regions of the world. Bilateral investment treaties have, therefore, become important mechanisms for the protection of foreign direct investment. However, they are not a substitute for a comprehensive multilateral regime on foreign investment. The need for a multilateral instrument, such as the code of conduct, which prescribes standards of corporate conduct as well as minimum standards for the treatment of foreign investors and transnational corporations, persists. Furthermore, bilateral investment treaties could be more effective in assuring one of their avowed objectives, namely, the promotion of foreign investment, by incorporating concrete provisions in this regard.

Notes

1/ Bilateral Investment Treaties (United Nations publication, Sales No. E.88.II.A.1).

2/ The purpose of this summary discussion is to highlight some of the most significant findings of the new study by the Centre on the negotiation of bilateral investment treaties, thus setting the stage for meaningful discussions in this area.

3/ Agreement between Japan and the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investment (August 1988), art. 1, para. 4.

4/ Treaty between the Republic of Zaire and the United States of America concerning the Reciprocal Encouragement and Protection of Investment (August 1984), article I (b).

5/ See "Contemporary practice of the United States", American Journal of International Law, vol. 84, No. 4 (October 1990), pp. 895-902.

Notes (continued)

6/ The complete text of the Fourth ACP-EC Convention (signed on 15 December 1989) is reproduced in The Courier, African-Caribbean-Pacific-European Community, No. 120, March-April 1990.

7/ Key Concepts in International Investment Arrangements and Their Relevance to Negotiations on International Transactions in Services, Current Studies, Series A, No. 13 (United Nations publication, Sales No. E.90.II.A.3).

8/ Organisation for Economic Co-operation and Development, "1967 draft convention on the protection of foreign property", International Legal Materials, vol. I (1968), p. 120, comments to art. I. Also see the declaration to that effect of the Swiss Department of External Affairs, Annuaire suisse de droit international (1980), p. 172. See, also, Huu-Tru, Nguyen, "Le reseau Suisse d'accords bilateraux d'encouragement et de protection des investissements", Revue générale de droit international public, vol. 92 (1988), p. 577 and 604-614.

9/ See, for example, Treaty of Friendship, Commerce and Navigation between the United States and Ireland, 21 January 1950, art. XXI, para. 2; General Agreement on Tariffs and Trade, in United Nations Treaty Series, vol. 55, No. 814, art. I, p. 194; "Draft articles on the most-favoured-nation-treatment clause, article 5, International Law Commission Report", International Law Commission Yearbook, vol. II, part 2 (1978), p. 21.

10/ See General Agreement on Tariffs and Trade, art. I.

11/ Bilateral Investment Treaty between Indonesia and Denmark, signed on 30 January 1968.

12/ On the scope and operation of the national treatment standard, see Key Concepts in International Investment Arrangements ...

13/ Treaty of Friendship, Commerce and Navigation between the United States and Ireland ..., art. XXI, para. 1.

14/ Organisation for Economic Co-operation and Development, International Investment and Multinational Enterprises: The OECD Guidelines for International Enterprises (Paris, 1986), pp. 9-10.

15/ Treaty Establishing the European Community, United Nations Treaty Series, vol. 298, No. 4300, art. 7, p. 17.

16/ See the 1983, 1988 and 1990 draft texts of the United Nations code of conduct on transnational corporations (E/C.10/1983/S.5/Rev.1, annex IV; E/1988/39/Add.1, appendix; and E/1990/94, annex, respectively).

17/ Bilateral investment treaty between Japan and the People's Republic of China (August 1988), art. I, para. 2.

Notes (continued)

18/ United States prototype treaty (1984 version) in Bilateral Investment Treaties ..., art. II, para. 3.

19/ Treaty between the United States and Zaire (August 1984), art. II, para. 5 (b).

20/ Ibid., art. II, para. 7.

21/ Bilateral investment treaty between the United Kingdom and Costa Rica, signed in September 1982, art. V, para. 1.

22/ Bilateral investment treaty between Venezuela and Italy, signed in June 1990, art. 8, paras. 1-4.

23/ Bilateral investment treaty between France and the USSR, signed in July 1989, art. 7.

24/ Bilateral investment treaty between the Federal Republic of Germany and Poland, signed in November 1989, art. 11.